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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 04.02.2016

% **CS(OS) 2850/2011**

**TIONG WOON PROJECT & CONTRACTING
PTE LTD**

..... Plaintiff

Through: Mr. S. Santanam Swaminadhan,
Ms.Nishtha Khurana & Ms. Mishika
Singh, Advocates.

versus

NAFTOGAZ INDIA PVT LTD & ORS

..... Defendants

Through: Mr. Siddharth Khattar, Advocate for
Ex-Management of defendant No.1.
Mr. Mayank Goel, Advocate for
Official Liquidator for Defendant
No.1.
Mr. Sanat Kumar & Ms. Puja
Kashyap, Advocate for defendant
No.2/ BORL.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. Since Mr. Mayank Goel has appeared for Official Liquidator as defendant No.1 company is under liquidation, Mr. Siddharth Khattar is discharged in the matter.

I.A. No. 10958/2012

2. This application has been moved by defendant No.1 under Section 8 of the Arbitration & Conciliation Act, 1996 to seek reference of disputes between the plaintiff and defendant No.1 to arbitration on the premise that the work order contract dated 14.11.2008 entered into between the plaintiff and defendant No.1 contains an arbitration clause. The defendant No.1 is the principal contractor in respect the contract awarded by defendant No.2. A part of the work was sub-contracted to the plaintiff, namely for provision & erection of cranes of coke drums (2 Nos.) and fractionators column (1 No.). The work order issued by defendant No.1 in favour of the plaintiff dated 14.11.2008, no doubt, contains an arbitration clause in clause 24 of the work order, which reads as follows:

“Unless otherwise specified in all cases of dispute that cannot be settled by mutual negotiations, the matter shall be referred for arbitration in accordance with the Arbitration & Conciliation Act 1996 of India with seat at New Delhi. Work under the contract shall be continued by the supplier during arbitration proceedings unless otherwise directed in writing by the Purchaser. All disputes shall be subject to the sole jurisdiction of Delhi Courts alone.”

3. The application is opposed by the plaintiff, who submits that there are no surviving arbitrable disputes between the plaintiff and defendant No.1 in view of the correspondence exchanged between the parties, and thus, the present application is liable to be dismissed. I have, accordingly, heard learned counsels on this application.

4. Under the work order, the tentative period for which the cranes of the

plaintiff were required for completion of job work was stated to be from 15th April to 15th May of 2008. Clause 9 of the work order stipulated that - being a lump sum contract, over time charges of 7 days working is included in the cost for 4 weeks. It was agreed that if the job goes beyond 4 weeks plus 1 week, per day charges payable will be INR 18,26,925. It also provided that TDS will be deducted on every bill and service tax/ WCT, if any, would be extra, as applicable. Under clause 12, defendant No.1 agreed to pay INR 475 Lakhs as lump sum amount towards the scope of work as defined. The payments had to be released to the plaintiff as per the following schedule:

“Following will be the payment terms

- *5% advance along with the order against ABG for an equal amount.*
- *15% on arrival of equipments at site.*
- *20% on ready for erection.*
- *60% on completion of the job and to be paid within 15 days.”*

5. It is not in dispute that the plaintiff raised its bill towards 5% advance; 15% upon arrival of crane at site; 20% on crane being readied for erection and; 60% on completion of the job. The bill for 20% of the contract sum - on the crane being ready for erection was raised on 08.06.2009, and the bill for 60% of the contract sum - on completion of the job, was raised on 16.07.2009.

6. The plaintiff thereafter raised additional bills for variation i.e. for usage of the cranes even after the expiry of period of 4 weeks plus 1 week,

in terms of clause 9 of the work order. The bills were raised by the plaintiff towards variations on 11.08.2009 (for INR 1,27,88,475/-), 12.08.2009 (for INR 3,44,23,050/-), 17.08.2009 (for INR 49,41,425/-) and 23.09.2009 (for INR 3,44,23,450/-). In the meantime, it appears that on 25.09.2009, defendant No.1 addressed a communication to defendant No.2, requesting defendant No.2 to issue a letter of comfort to the plaintiff “*for the outstanding amount of Rs.6,36,13,136/-*” which could be released to the plaintiff “*on submission of progressive invoices to BORL certification of invoices by M/s NG*”. Defendant No.1 requested defendant No.2 “*to kindly issue the letter at the earliest to insure timely erection of Coke Drums*”. On the same day, defendant No.2 issued the letter to the plaintiff, wherein defendant No.2 stated as follows:

“*Dear Sir,*

M/s NaftoGaz vide letter Ref, # NG/BORL/6743/CDSP/L-023 dtd. 25.09.2009, requested to issue “Letter of Comfort” towards your outstanding payments against heavy lift erection works carried out at CDSP Bina.

For the purpose of expeditious and smooth completion of the work, we hereby, assure and agree to release an amount of Rs. 6,36,13,136 (Rs. Six Crores Thirty Six Lakh Thirteen Thousand One Hundred & Thirty Six only) to M/s Tiong Woon Project (India) Pvt. Ltd., on first priority basis from the certified bills/invoices of M/s NaftoGaz India Pvt. Ltd., against our contract (FOA # BRP/MECH/135 dtd. 05.07.09) for “Coke Drum System Package” work at Bina Refinery.

Thanking you,

Yours faithfully

For & on behalf of BORL”

7. In the aforesaid two communications, M/s TWC has been used for the plaintiff, BORL has been used for the defendant No.2, whereas M/s NG has been used for defendant No.1. After the issuance of the letter dated 25.09.2009 by defendant No.2, the plaintiff raised one more bill dated 28.09.2009 (for Rs.61,80,000/-).

8. The defendant No.2 issued a communication on 01.04.2010 addressed to defendant No.1 - with copy to the plaintiff, which reads as follows:

“Dear Sir,

*With reference to the subject, for smooth erection of coke drum & frac. Column at CDSP site, comfort letter was issued to M/s TWC on 25th Sep. 09, as per your request, for an amount of Rs. 6.36 Crs. **Though, the activity has been completed since long, your payment matter with sub-agency is yet to be resolved. So far, only Rs. 3.14 Crs is paid and an outstanding comfort amount of Rs. 3.22 Crs is still balance.***

Since the matter is long outstanding, it is in your interest to settle/reconcile the issue at earliest for release of payments. Please note that, till the payment matter with TWC is settled/resolved, the related amount shall be considered as hold for keeping provision towards outstanding comfort amount.

You are once again advised to do the needful for early settlement/resolution of the matter & inform us for necessary action at our end.

Yours faithfully,

For & on behalf of BORL”

(Emphasis supplied)

9. After the issuance of this communication, defendant No.1 sent a communication to the defendant No.2 on 26.10.2010, *inter alia*, stating:

“... .. it may be well known to you that still a substantial amount is balance to be paid to M/s TWC from the total amount of the comfort letter due to the exigencies of the project completion and for ensuring the necessary resources availability at site NaftoGAz did not request M/s BORL to release the payments to M/s TWC but now at this time we can gladly inform you that the project is nearing completion finally and we anticipate that the package will be handed over to M/s BORL for the commencement of commissioning of the unit.

Further we would like to bring the following details to your notice that the RA bills amounting to Rs. 21.36 Cr are already submitted to M/s BORL/ EIL for the necessary release of payments to M/s NaftoGaz.

Hence we would like to humbly request M/s BORL to kindly release the balance payable amount to M/s TWC against the comfort letter issued to them by M/s BORL.

Therefore, in view of the above facts and detailed data regarding the pending receivable by NaftoGaz we once again request M/s BORL to release the payments to M/s TWC on priority.”

(Emphasis supplied)

10. Despite the aforesaid communication by defendant No.1 to defendant No.2, defendant No.2 did not make payment of the amount of Rs.3.22 Crores to the plaintiff in terms of the comfort letter issued by defendant No.2, and the further communication of 01.04.2010. Since the payment has not been made by either of the defendants, the plaintiff has filed the suit, impleading both the defendants as parties. The suit had been preferred

under Order XXXVII CPC as a summary suit.

11. The submission of learned counsel for the defendant no.1 is that the communication dated 26.10.2010 relied upon by the plaintiff, and attributed to defendant No.1, was obtained conclusively by the plaintiff from the officer of the defendant Sh. A.C. Dwivedi, Vice President (Projects), and that he had no authority to issue the said communication. Learned counsel for the defendant No.1 has sought to place reliance on the averments made in the application seeking leave to defend in this respect. The application of defendant No.1 preferred under Order XXXVII Rule 3(5) CPC, i.e. I.A. No.10957/2012 makes the following averments qua the letter dated 26.10.2010:

“18. It is submitted that the Plaintiff in collusion with Mr. A.C., Dwivedi, employee of the Defendant No.1 have forged the invoices and letters drawing liability on the Defendant No.1 for the work which was never executed by the Plaintiff. It is pertinent to mention here that the Defendant no.1 has already paid to the Plaintiff more than its actual entitlement under the Work Order. It is submitted that the Defendant No.1 used to make on-account/running payments to the Plaintiff. Whenever the stage for payment came as per schedule agreed in the Work Order dated 14.11.2008, the Defendant No.1 used to make on-account payment to the Plaintiff. It is submitted that while the value of the total contract was Rs. 4,75,00,000/- the Defendant No.1 has admittedly paid a sum of Rs. 8,64,10,312/- to the Plaintiff. The letter-dated 26.10.2010 was also in collusion with the Plaintiff and the aforesaid employee of the Defendant No.1 and thus cannot be relied on to ascertain the liability of the Defendant no.1 towards the Plaintiff since there exists none. All these facts can only be adjudicated while trial and the present dispute cannot be decided on a summary manner. The

Defendant No.1 is entitled to unconditional leave to defend on this ground alone.”

12. Pertinently, in paragraph 19 of the same application, defendant No.1 alleges collusion on the part of the said Mr. A.C. Dwivedi, Vice President (Projects) of defendant No.1 and the plaintiff, even in the matter of issuance of the letter dated 25.09.2009 by defendant No.1 to defendant No.2, requiring defendant No.2 to issue the comfort letter. The application seeking leave to defend, apart from making a bald assertion that there was “collusion” between the plaintiff and the said Mr. A.C. Dwivedi, does not set out as to what was the nature of collusion, and how it was given effect to. If there was collusion between the plaintiff and Mr. A.C. Dwivedi, it has not been explained as to what action has been taken by defendant No.1 either against Mr. A.C. Dwivedi, or the plaintiff. Mr. A.C. Dwivedi was not some junior or insignificant officer of defendant No.1. He was a senior officer holding the designation of Vice President (Projects). It is not the case of defendant No.1 that any departmental/ disciplinary action was taken against him for his alleged collusion with the plaintiff, or a First Information Report was registered with the Police. In any such action, the plaintiff would have had to be roped in necessarily, as the allegation now made is of collusion, i.e. a fraud. However, there is no such action initiated by defendant No.1 either against the said Mr. A.C. Dwivedi and/ or against the plaintiff. The fallacy in the allegation of collusion is completely exposed by the fact that even the letter dated 25.09.2009, issued by defendant No.1 requesting defendant No.2 to issue the comfort letter, has been claimed to have been issued on account of the so-called collusion between the plaintiff and Mr. A.C. Dwivedi. This letter was acted upon by defendant No.2, who even sent

subsequent communication of 01.04.2010 premised on its earlier letter of comfort. The contents of the letter dated 26.10.2010, even otherwise, are in accord with what defendant No.2 stated in its earlier letter dated 01.04.2010. In my view, the plea with regard to the exercise of collusion between the plaintiff and Mr. A.C. Dwivedi is a completely sham plea with no legs to stand on. This plea is, accordingly, rejected.

13. From the correspondences taken note of hereinabove, it is, thus, clear that no arbitrable dispute survive with regard to the service rendered by the plaintiff under the contract between the plaintiff and defendant No.1. Defendant No.1 has itself issued the communication dated 26.10.2010 - asking defendant No.2 to release the balance amount of Rs.3.22 Crores to the plaintiff. Pertinently, the request for issuance of letter of comfort was made on 25.09.2009, and the same was issued on the same day by defendant No.2. This date was well beyond the contractual period of four weeks plus one week during which the cranes were contractually agreed to be used for a lump sum of Rs.4 Crores 75 Lakhs. Obviously, the comfort letter came to be issued as the cranes were being used even beyond the said period of 4 weeks plus 1 week, and the dues for use of the cranes were mounting. It was on that account that the plaintiff required comfort that its payments would be made for continued user of the cranes, and it was for this reason that defendant No.1 requested defendant No.2 to issue the comfort letter. Pertinently, the letter of 25.09.2009 - issued by defendant No.1, itself recorded that the comfort letter be issued to the plaintiff "*for the outstanding amount of Rs.6,36,13,136*". By this date, as noticed above, the plaintiff had already raised all of its invoices, and the only invoice raised by the plaintiff

after the issuance of the said comfort letter was the one dated 28.09.2009 for INR 6,180,000/-.

14. Mr. Sanat Kumar, who appears for defendant No.2 has submitted that there are disputes pending between the defendant No.1 and defendant No.2, and there is an arbitration agreement in the contract between the said two defendants. He submits that no amount is payable by defendant No.2 in terms of the comfort letter to the plaintiff, since the amount of Rs.18 Crores is recoverable by defendant No.2 from defendant No.1. In my view, the disputes between defendant No.1 and defendant No.2 *inter se* do not concern the plaintiff at all. The plaintiff is not a party to the agreement between the two defendants, and whatever be the *inter se* disputes between the two defendants, the plaintiff cannot be embroiled in those disputes. The contract between the plaintiff and defendant no.1 does not say that the payment due to the plaintiff shall be made only after the claims of defendant no.1, against defendant no.2, are settled. Consequently, there is no outstanding arbitrable dispute surviving between the plaintiff and defendant No.1.

15. Accordingly, the application preferred by defendant No.1 under Section 8 has no merit and the same is dismissed.

I.A. No. 10957/2012 (u/o 37 rule 3(5) CPC on behalf of defendant no.1) and I.A. No.12356/2012 (u/o 37 rule 3(5) CPC on behalf of defendant no.2 to seek leave to defend)

16. I have heard learned counsel for the parties on the aforesaid two applications. The background facts necessary for disposal of these applications have already been taken note of herein above. So far as

defendant no.1 is concerned, the primary plea of defendant no.1 is that the letter dated 26.10.2010 had been obtained by the plaintiff in collusion with Sh. A.C. Dwivedi, Vice President (Projects). This submission has already been rejected while considering I.A. No.10958/2012.

17. A perusal of the said communication itself shows that the defendant no.1 admits its liability towards the plaintiff to the tune of Rs.3.22 crores. The plea of defendant no.1/applicant that there was delay on the part of the plaintiff in erecting cranes, and that in terms of clause 23 of the work order dated 14.11.2009, the plaintiff was liable for liquidated damages cannot be accepted in the face of the communication dated 26.10.2010 issued by the defendant no.1.

18. Defendant no.1 has also sought to contend that as against the lumpsum payment of Rs.4.75 crores under the work order, defendant no.1 paid Rs.8,64,10,312/- to the plaintiff. What has conveniently been overlooked by defendant no.1 is that under the work order – beyond the period of 4 weeks + one week, for continuous usage of the cranes in question, the plaintiff was entitled to a further payment of Rs.18,26,925/- per day. Defendant no.1 had itself acknowledged in the communication dated 25.09.2009 addressed to defendant no.2 that the outstanding amount of the plaintiff was Rs.6,36,13,136/-. The same included the amount due to the plaintiff for variation/excessive and continued use of the cranes beyond the period of 4 weeks + one week – the lump sum consideration wherefor had been agreed at Rs.4.75 crores. In the face of the communication dated 26.10.2010 issued by defendant no.1 itself in favour of the plaintiff, it does not lie in the mouth of defendant no.1 to now turn around and claim that the

plaintiff has been over paid, and is not entitled to the said amount.

19. The defences raised by defendant no.1 are most frivolous and moonshine. They have been raised only as an afterthought, with a view to somehow evade the passing of a decree against them. The application preferred by defendant no.1 to seek leave to defend is, accordingly, dismissed.

20. So far as the application filed by defendant no.2 – also to seek leave to defend is concerned, once again, I find absolutely no merit in the said application. So far as defendant no.2 is concerned, by issuing the comfort letter dated 25.09.2009, the defendant no.2, in fact, guaranteed the payment due to the plaintiff under the plaintiffs contract with defendant no.1 to the extent indicated in the said letter, and subject to approval of the bills by the defendant No.1. The said payment was bound to be made by defendant no.2 to the plaintiff in terms of the said assurance/comfort/ guarantee, once the conditions of the said assurance were satisfied.

21. The submission of Mr. Sanat Kumar is that the conditions of comfort letter have not been fulfilled inasmuch, as, the said comfort letter itself stipulates that the payment would be made to the plaintiff on the basis of bills/invoices of the plaintiff certified by defendant no.1. He submits that defendant no.1 has not certified the bills/invoices of the plaintiff and, therefore, the defendant no.2 is not obliged to make payment under the said comfort letter. I do not find merit in this submission.

22. A perusal of the letter of defendant no.2 dated 01.04.2010 itself shows that even according to defendant No.2, the activity of the plaintiff “*has been*

completed since long". Defendant No.2 in this communication acknowledged that out of the amount of Rs 6.36 Crores – to which the comfort letter related, the plaintiff had been released an amount of Rs. 3.14 Crores, and *"an outstanding comfort amount of Rs. 3.22 Lakhs is still balance"*. The defendant No.2 also stated that *"till the payment matter with TWC is settled/resolved, the related amount shall be considered as hold for keeping the provision towards outstanding comfort amount"*. Thereafter, defendant No.1 issued the communication dated 26.10.2010, as noted above. This communication, in categorical terms, instructed defendant No.2 to release the balance amount under the comfort letter to the plaintiff. The issuance of this communication dated 26.10.2010, in my view, meets the requirements of the comfort letter of submission of certified bills/invoices. This letter was issued by defendant No.1 after the receipt of all the bills of the plaintiff. Defendant No.1 has not claimed that it ever disputed any of the plaintiffs bills. This letter itself contains the certification in respect of outstanding bills of the plaintiff. Thus, the aforesaid submission of Mr. Sanat Kumar is rejected.

23. Another submission of Mr. Sanath Kumar is that Rs.18 crores is recoverable by defendant no.2 from defendant no.1. Since the plaintiff is a sub-contractor of defendant no.1, the defendant no.2 is entitled to adjust the amount due to the plaintiff from the dues of defendant no.1.

24. I do not find any merit in this submission for the reason that defendant no.2 issued its letter of comfort/guarantee to the plaintiff, and while doing so, no reservation to this effect was made. It was on the assurance and guarantee of defendant no.2 that the plaintiff continued to work the contract

beyond 25.09.2009. Defendant no.2, admittedly, withhold and kept apart the amount secured under the said letter of guarantee, as is evident from the letter of defendant no.2 dated 01.04.2010 itself. In fact, defendant no.2 offered to make the said payment once the issues are resolved between the plaintiff and defendant no.1. That issue stood resolved with the issuance of the letter dated 26.10.2010 by defendant no.1. Consequently, after the issuance of the said letter dated 26.10.2010, there could be no justification for defendant no.2 to withhold the amount of Rs.3.2 crores from the plaintiff. Consequently, I find that the defence set up by defendant no.2 is also most frivolous and sham. The same is, accordingly, rejected.

25. Learned counsel for the defendants had argued that the work order dated 14.11.2008 did not provide for payment of any interest to the plaintiff on overdue payments. They submit that the plaintiff is, therefore, not entitled to payment of any interest.

26. The plaintiff has prayed for pendente lite and future interest on the amount of Rs.3.22 crores @ 18% p.a. The plaintiff has not even sought pre-suit interest. The power of the Court to award interest pendente lite and post decree till realisation is preserved in law under Section 34 CPC.

27. With the aforesaid observation, both the applications are dismissed.

CS(OS) No. 2850/2011

28. By a separate order passed hereinabove today, the applications seeking leave to defend preferred by both the defendants have been rejected. The history of the case has already been taken note of herein above and,

therefore, I do not consider it necessary to recite the same once again. Accordingly, the suit of the plaintiff is decreed for the principal amount of Rs.3.22 Crores.

29. Looking to the fact that the transaction between the parties was a purely commercial transaction, the plaintiff would be entitled to interest on the principal liability of Rs.3.22 crores from the date of filing of the suit till realisation @ 10% p.a. Accordingly, the suit of the plaintiff is decreed for an amount of Rs.3.22 crores under Order 37 CPC along with interest, as aforesaid.

VIPIN SANGHI, J

FEBRUARY 04, 2016

B.S. Rohella /sr